United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7200

UNITED STATES COURT OF APPEALS
FILED
AUG 5 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77 - 7200

GERALD L. JOHNSON, CHARLES A. HEMMING, ORION A. LARSON, ROBERT THOMPSON, VIRGIL VALENTINE, individually and as members of the International Organization of Masters, Mates and Pilots of America, AFL-CIO, and the Offshore Division thereof,

Plaintiffs-Appellees

-against-

FRANK T. [illegible]AVO, as President of the International Organization of Masters, Mates and Pilots and as Executive Officer of the Offshore Division,

Defendant-Appellant

BRIEF ON BEHALF OF
DEFENDANT-APPELLANT

JAFFE COHEN CRYSTAL & MINTZ
Attorneys for Defendant-Appellant
New York, New York 10001

Ernest Allen Cohen
Allen B. Breslow
of Counsel

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77 - 7200

GERALD L. JOHNSON, CHARLES A. HEMMING, ORION A. LARSON, ROBERT THOMPSON, VIRGIL VALENTINE, individually and as members of the International Organization of Masters, Mates and Pilots of America, AFL-CIO, and the Offshore Division thereof,

Plaintiffs-Appellees

-against-

FRANK T. SCAVO, as President of the International Organization of Masters, Mates and Pilots and as Executive Officer of the Offshore Division,

Defendant-Appellant

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

TABLE OF CONTENTS

	PAGE
Statement of the Issues	1
Statement of the Case	2
a) Nature of the Proceeding	2
b) Facts of the Case	2
Applicable Provisions of International Constitution and Offshore Division By-Laws	4
ARGUMENT:	8
POINT I -	
The President has the Constitutional Right to Submit Referenda for a Vote by the Membership of the Offshore Division which cannot be Restricted by the International Convention.....	8
POINT II -	
The President has the Final Authority to Interpret the International Constitution.....	15
CONCLUSION	32

TABLE OF CASES

Abrams v. Carrier Corp. 434 F. 2d 1234 (2d Cir. 1970)....23

Carpenter, Local 657 v. Sidell F. 2d , 95 LTMM 2047 (6th Cir. 1976).....32, 23

English v. Cunningham, 282 F. 2d 848, 850, 46 LRMM 2660 (D.C. Cir. 1960) 15

PAGE

Garland, Ex Parte, 71 U.S. 333 (1866).....11

Garton v. Arons 339 F. 2d 371, (2d Cir. 1964).....20

International Association of Machinists v. Gonzales, 356 U.S. 617 (1958) 23

Laba v. Carey 29 N.Y. 2d 302 (1968) 24

Local Union 1219 v. United Brotherhood of Carpenters and Joiners 493 F. 2d 93 (1st Cir. 1974) 23

Muzak Constitution v. Hotel Taff Corporation 1 N.Y. 2d 42 (1956).....24

Myers v. U.S. 272 U.S. (1927) 12

Navarro v. Gannon, 385 F. 2d 512 (2d Cir. 1967) cert. denied 390 U.S. 989, rehearing denied 390 U.S. 1046.....14

NLRB v. Boeing Co. 412 U.S. 67 (1973) 23

Parks v. International Brotherhood of Electrical Workers 314 F. 2d 886 (4th Cir. 1963).....23

Rodolitz v. Neptune Paper Products, Inc. 22 N.Y. 2d 383 (1968) 24

Rota v. Brotherhoof of Railway, Airline and Steamship Clerks, 489 F. 2d 998, 1003 (7th Cir. 1973) 20

Sheldon v. O'Callaghan 497 F. 2d 1276, 86 LRRM 3064 (1974) 17

Talton v. Belnick 199 F. 2d 471 (7th Cir. 1952) 25

Trail v. Teamsters 542 F. 2d 961 (6th Cir. 1976) 23

Vestal v. Hoffa, 451 F. 2d 706, 78 LRRM 2996 (6th Cir. 1971) cert. denied 406 U.S. 938 (1972).....15,16

Vestal v. Teamsters, 245 F. Supp. 623, 60 LRRM 2156 (M.D. Tenn. 1965) 16,18

Telvington v. Presidential Pardon and Parole Attorneys 211 F. 2d 643 (D.C. Cir. 1954).....11

PAGE

STATUTES

Labor Management Reporting and Disclosure Act of 1959, 29 W.C.C. 401 et. reg.....14

Tenure of Office Acts, 14 Stat. 430, 16 Stat. 6 12

AUTHORITIES

3 Corbin Sec. 545-557.....19,28

Restatement, Contracts Sec. 236(c) (1932).....19

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77 - 7200

GERALD L. JOHNSON, CHARLES A. HEMMING, ORION A. LARSON, ROBERT THOMPSON, VIRGIL VALENTINE, individually and as members of the International Organization of Masters, Mates and Pilots of America, AFL-CIO, and the Offshore Division thereof,

Plaintiffs-Appellees

-against-

FRANK T. SCAVO, as President of the International Organization of Masters, Mates and Pilots and as Executive Officer of the Offshore Division,

Defendant-Appellant

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

Statement of the Issues

1. Does the President have the Constitutional Right to Submit Referenda for a Vote by the Membership of the Offshore Division which cannot be Restricted by the International Convention?

The Court erred in answering this in the Negative.

2. Does the President have the Final Authority to Interpret the International Constitution?

The Court erred in answering this in the Negative.

STATEMENT OF THE CASE

A. Nature of the Proceeding

This is an appeal by Frank T. Scavo (hereafter "President"), President of the International Organization of Masters, Mates and Pilots (hereafter "International") and Executive Officer of the Offshore Division of International (hereafter "Offshore Division") from an Order of United States District Court Judge Lawrence W. Pierce, entered on April 11, 1977 enjoining the President from exercising his authority pursuant to Article VI, Section 1(i) of the International Constitution by submitting to the membership of the Offshore Division a referendum on a matter which he believed would enhance or protect the welfare of the membership of the Offshore Division.

B. Facts of the Case

The President believed that the welfare of the membership of the Offshore Division would be protected or enhanced by a reduction in that portion of membership dues as are calculated based upon vacation benefits. He therefore submitted to the membership of the Offshore Division a referendum that would reduce the dues from 6% to 4% in conjunction with "effecting a practical reduction of operating costs of the Offshore Division without curtailing service to the membership."

The Plaintiffs commenced this action to restrain the processing of the referendum vote by the membership. An application for a temporary restraining order was denied. Subsequently, a majority of delegates to the International Convention, the legislative arm of the Union, passed a resolution prohibiting the President from carrying out his duties and directing him to comply with such resolution. On March 11, 1977, a hearing was held on an application for a preliminary injunction which was consolidated pursuant to Rule 65 of the Federal Rules of Civil Procedure with a trial on the merits.

On March 14, 1977, the District Court rendered its opinion based largely upon the resolution adopted at the International Convention and ruled that the International President did not have the authority to submit to the membership of the Offshore Division a referendum which would have the effect of reducing their union dues.

APPLICABLE PROVISIONS OF INTERNATIONAL CONSTITUTION AND OFFSHORE DIVISION BY-LAWS

This case involves the interpretation of the Constitution of the International and the By-Laws of the Offshore Division. The provision of the Constitution required to be interpreted is Article VI, Section 1, which sets forth the duties of the International President and which states in subparagraph (i) thereof that "it shall be the duty of the International President and he is hereby authorized to:

> "direct that a referendum vote... be held by the membership of any subordinate body on **any** matter, issue or proposition when he believes that the welfare of the membership of the subordinate body will be protected or enhanced by such action." (Emphasis added)

In interpreting this provision, it is relevant to examine Article VI, Section 1 subparagraph (d) of the International Constitution which authorizes the President to:

> "decide on all points of law, interpretations of the Constitution, and/or grievances submitted to him by the subordinate bodies, after consulting with International Counsel..." (Emphasis added.)

and also Article IV, Section 1 which sets forth the authority of the International Convention and which limits that authority in the last line thereof is as follows:

> "The Convention does not have the power to alter or amend the Constitution except as provided in Article X hereof." (Emphasis added.)

In placing these matters in context the following provisions of the International Constitution must also be examined:

Article VI, Section 1(b) which authorizes the President to:

> "grant dispensation authorizing subordinate bodies to organize and authorize groups to operate until such time as they receive their charters with the approval of the General Executive Board." (Emphasis added.)

Article VI, Section 1(d) that, in part, authorizes the President to order

> "a subordinate body to observe the laws, rules and regulations and if the subordinate body refuses, the subordinate body shall be subject to suspension or revocation of its charter with the approval of the General Executive Board." (Emphasis added.)

Article VI, Section 1(h) which authorizes the President to serve the government of the United States for 30 days:

> "If such service is for more than thirty days it shall require approval of the General Executive Board by its majority vote." (Emphasis added.)

Article VI, Section 1(m) which authorizes the President to:

> " appoint such organizers, representatives, assistants, counsel, accountants and other professional personnel as he may require to assist him in the duties of his office and to fix their compensation, with the approval of the General Executive Board." (Emphasis added.)

Article VI, Section 1(n) which authorizes the President to:

> "appoint a Trustee to take charge and control of the affairs of a subordinate body in accordance with applicable provisions of the Constitution and the approval of the General Executive Board..." (Emphasis added.)

Article VII, Section 3 which states:

> "The General Executive Board shall act upon and decide on all appeals presented to it by subordinate bodies or individual members.... and shall decide on all questions of law."

Article VII, Section 3 also provides that the General Executive Board is:

> "second only to the Convention in legislative and policy-making authority..."

Article IX, Section 4(a) which states, in part:

> "Each subordinate body shall adopt By-Laws or rules governing all aspects of its operation not in conflict with this Constitution. Such By-Laws shall be adopted and amended only by a majority referendum vote.
>
> Any Article in the By-Laws of any subordinate body conflicting with this Constitution is void and may not be enforced." (Emphasis added.)

Article X, Section 1 provides for amendment of the International Constitution by the following procedures:

> "1) a two-thirds' majority pro rata vote in a Regular, Special or Constitutional Convention; and
>
> 2) approved by a majority vote of the membership voting in a secret referendum ballot."

ARGUMENT

POINT I

THE PRESIDENT HAS THE CONSTITUTIONAL RIGHT TO SUBMIT REFERENDA FOR A VOTE BY THE MEMBERSHIP OF THE OFFSHORE DIVISION WHICH CANNOT BE RESTRICTED BY THE INTERNATIONAL CONVENTION.

The basic facts with regard to this matter were the subject of a stipulation agreed to by all parties in the Court below. Neither the facts nor the governing principle of law is in dispute between the parties. All parties appear to have agreed that the President, pursuant to Article VI, Section 1(i) of the International Constitution, retained the services of the American Arbitration Association to process a referendum ballot to the membership of the Offshore Division with respect to a matter which he determined affected the welfare of the membership of the Offshore Division and that subsequent to the denial by the Court below of a temporary restraining order sought to prevent the processing of such referendum, the American Arbitration Association mailed the referendum ballots to the membership of the Offshore Division. There is no dispute that subsequently the International Convention adopted a resolution declaring that the President had no authority to send such a referendum to the membership of the Offshore Division and that thereafter the Court below

enjoined the President from initiating any referendum in conflict with resolutions of the International Convention. The issue, therefore, is whether the President had the right to direct a referendum vote by the membership of a subordinate body on any matter, issue or proposition when he believes that the welfare of the membership of the subordinate body will be protected or enhanced by such action and whether a majority of the International Convention has the power to restrict the President in the exercise of his authority to direct such referendum vote and, therefore, prevent the members of a subordinate body from determining for themselves matters of concern to them.

All parties seemed to have agreed that the Court has the right to overturn any act either by the President or by the International Convention which is in violation of the International Constitution. Moreover, all parties seem in agreement that the Court has the power to overturn any unreasonable or unfair interpretation of a union constitution which is made by the final interpreting authority of the union. The dispute between the parties relates to whether the interpretation by the majority of the International Convention that, the President did not have the right to direct a referendum vote to the Offshore Division which would have the effect of amending the Offshore Division By-laws if adopted by

a majority vote of the members of the Offshore Division, was a reasonable interpretation in the light of the plain language of Article VI, Section 1(i) of the International Constitution which contains no restrictions whatsoever upon what matters, issues or propositions may be submitted by the President to referendum vote by members of subordinate bodies so long as the President "believes that the welfare of the membership of the subordinate body will be protected or enhanced by such action."

It is the position of the appellant that any attempt to interpret Article VI, Section 1(i) of the International Constitution to inhibit the right of the President to initiate such referendum is inherently unreasonable and unconstitutional and that the action by a majority of the International Convention in attempting to do so is as unconstitutional as a resolution by the International Convention would be which would abolish the office of the International President. To leave the facade of the office of President while eliminating its basic powers and duties is no less objectionable than eliminating the office itself. It is the position of the appellant that the delicate system of checks and balances provided in the International Constitution can be destroyed if a majority of the International Convention can, piece by piece, restrict, inhibit, destroy or eliminate the powers and duties vested

by the International Constitution in the President. Just as the Constitution of the United States imposes restrictions upon the ability of the legislative body to inhibit the exercise of certain powers and duties of the executive so the International Constitution imposes a clear and unambiguous restriction upon the International Convention in seeking to interfere with powers constitutionally vested in the President.

The United States Constitution vests the power to pardon solely in the President of the United States. Const., Art. II, §2, cl. 1. "The power thus conferred is unlimited...This power of the President is not subject to legislative control." Ex Parte Garland, 71 U.S. 333, 380 (1866). See also Yelvington v. Presidential Pardon and Parole Attorneys, 211 F. 2d 643, 643-644 (D.C. Cir. 1954) in which the appellant argued that pursuant to the Code of Federal Regulations, he was entitled to have a favorable clemency report submitted to the President. The court held that the Administrative Procedure Act and the regulations promulgated thereunder, did not require the members of the Attorney General's Office to convey clemency reports to their superiors. Relying upon the case of Ex Parte Garland, supra, the court stated that the power

of the President is not subject to legislative control. During the Civil War era, Congress passed the Tenure of Office Acts, 14 Stat. 430, 16 Stat. 6, which restricted the removal by the President, of individuals, who held appointive positions in the executive branch of the government. President Johnson claimed the Act was unconstitutional but the issue was not litigated. Subsequently when President Grant took office in 1869, he complained most forcefully to the Congress over the infringement on what had traditionally been an executive power. Congress relieved him of many restraints and over the course of the next 50 years, continued to repeal sections of the Act and limit its application to a smaller and smaller number of persons. Finally, an individual named Myers was removed from office and claimed the protection of the Act. In Myers v. U.S., 272 U.S. 52 (1927) the Supreme Court held that the power of the Executive to remove individuals who held appointive office, was based on a constitutional grant of power and could not be infringed by the legislature.

In the instant case, the authority of the President to "direct that a referendum vote...by the membership of any subordinate body on any matter, issue or proposition..." is not limited by any other provision of the International Constitution and is therefore not subject to control of the legislative body of International, the International

Convention.*

Much has been made of an argument asserted on behalf of appellees that a contrary holding in this case would constitute the President a dictator or czar. This kind of an argument is well recognized as an extreme tool of advocacy known as "the parade of the horribles." In point of fact, the only power that the President seeks to assert in this case is the power to enable the entire membership of a subordinate body to determine for itself, in secret ballot referendum conducted by the American Arbitration Association, as impartial agency, issues of vital concern to that subordinate body. If the position of the International Convention is upheld, no referendum will take place at the initiative of the President and union democracy will suffer a severe blow. Moreover, upholding the action of the International Convention will establish a precedent enabling the International Convention to run roughshod over the clearly delegated powers and authorities vested in the President and others pursuant to the International Constitution. If the President prevails, the interest of union democracy will be served and the membership of the union will be able to control its own affairs.

---

* That the International Convention is a legislative body is indicated in Article VII, Section 3 of the International Constitution which states that the General Executive Board is "Second only to the Convention in legislative" power.

The main thrust of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401 et. seq. was to preserve for union members their right to participate fully in the operation of their union. Thus, the Bill of Rights of Members of Labor Organizations, 29 U.S.C. § 411, makes eminently clear that it is national labor policy for each union member to have equal rights and priviledges to vote in union elections and referendums. The statute was enacted to assure and foster full and active participation by the rank and file in the internal affairs of the union. Navarro v. Gannon, 385 F. 2d 512 (2d Cir. 1967), cert. denied 390 U.S. 989, rehearing denied 390 U.S. 1046. The actions of the President in this case were wholly consistent with the basic intent of federal labor policy to increase the effective control of union members over their own destiny.

POINT II

THE PRESIDENT HAS THE FINAL AUTHORITY TO INTERPRET THE INTERNATIONAL CONSTITUTION.

A subordinate issue which has been blown out of all proportion by the appellees is the question of who is vested by the Constitution itself with the final authority to interpret the Constitution for the union. As is acknowledged by all parties, and as is clearly the law, regardless of who has such authority, it may not be exercised unreasonably or unfairly.

Although courts are reluctant to substitute their judgment for that of union officials in the interpretation of a union constitution nonetheless courts have a duty to protect the constitutional rights of union members and will, therefore, overturn any alleged interpretation which is not fair or reasonable under all of the relevant facts and circumstances. See Vestal v. Hoffa, 451 F. 2d 706, 78 LRRM 2996 (6th Cir. 1971), cert denied 406 U.S. 938 (1972); English v. Cunningham, 282 F. 2d 848, 850, 46 LRRM 2660 (D.C. Cir. 1960). When confronted with an issue as to the reasonableness and fairness of an interpretation of a

union's constitution, a court should look first to the union's constitution to determine who the constitution says is empowered to interpret the document and second, based upon all the facts and circumstances of the case, a court should determine if that interpretation can be justified by the constitution or by-laws themselves in the light of such facts and circumstances. Only after a court reviews the facts and decides that the interpretation is unfair or unreasonable, should a court render its own interpretation of the constitutional provision. Vestal v. Teamsters, 245 F. Supp. 623, 60 LRRM 2156 (M.D. Tenn. 1965); Vestal v. Hoffa, supra.

Thus, in Vestal v. Teamsters, supra, the court first determined that the constitution gave the President the authority to interpret the constitution and to decide the relevant questions of law, and second, tha the President had the authority to settle and determine the relevant grievances and disputes submitted to him. The President ruled, and the General Executive Board affirmed, that in a local composed of freighter members and non-freighter members, a referendum vote may be held by freighter members only, pursuant to a provision that empowered the President to direct a referendum vote to be held by the membership of any local or any

subordinate body. After a full hearing and after examining the facts, the court rejected the President's interpretation that freighters are a subordinate body as that term was used in the constitution. The court decided that the President's interpretation of the constitution was unreasonable since no other provision of the constitution gave the President discretion to order a referendum by less than the entire membership of a local.

The International Constitution vests final authority to interpret the Constitution in the International President. Article VI, Section 1(d) grants to the International President authority to "decide on all points of law, interpretations of the Constitution and/or grievances submitted to him by the subordinate bodies, after consulting with International Counsel..." This grant of authority to the President is consistent with the theory of the Constitution as found by the Court of Appeals for the Second Circuit in Sheldon v. O'Callaghan, 497 F. 2d 1276, 86 LRRM 3064 (1974). In that case, which involved the ratification of the present International Constitution, the Court said that the new Constitution:

> "...raised the salaries of the two top International Officers, and provided for a new $35,000 salary for a third, previously unsalaried International Officer. It greatly

> increased the power of the three International Officers by providing that those three officers were to become the three top officers of each division, including the Offshore Division..." (Emphasis added.)

The court below erred in not following the methodology adopted by the court in Vestal v. Teamsters, supra. The court, confronted with an issue as to the reasonableness and fairness of an interpretation of the International Constitution should have examined the Constitution to determine who the Constitution authorizes to interpret the document. It is clear that the only specific grant of authority to interpret the International Constitution is given to the International President in Article VI, Section 1(d). There is no specific grant of authority to the International Convention or to the General Executive Board to interpret the International Constitution. Thus, Article VII, Section 3 in general terms authorizes the General Executive Board to "decide on all questions of law." Such general language is not authorization to interpret the International Constitution. Furthermore, although Article IV, Section 1 of the International Constitution invests the International Convention with general power and authority over the International, the Constitution specifically prohibits

the Convention from altering or amending the Constitution except as provided in Article X. Obviously, the general provisions relating to the General Executive Board and the International Convention must under all normal standard rules of interpretation give way to the specific provisions relating to the specific power of the President. See Restatement, Contracts, §236(c) (1932); 3 Corbin §545-554.

The President interpreted the Constitution as was his right. The International Convention interpreted the Constitution for which action the court below should have found no authority. Assuming arguendo that such authority existed the court below should have inquired into the reasonableness and fairness of such interpretation by the Convention. Instead of analyzing the provisions of the Constitution to determine if the President has the right to propose a referendum that has the effect of amending the By-laws of the Offshore Division, the court below merely assumed that resolutions of the Convention were fair and reasonable and that therefore the President had no such power.

No argument has been made nor is one available that the membership of a union may not vest the authority to interpret the constitution in its president, who can be held strictly accountable, rather than in its supreme legislative body where accountability becomes defused, confused and difficult. There is a "general national policy against judicial interference in internal affairs of unions." Rota v. Brotherhood of Railway, Airline and Steamship Clerks, 489 F. 2d. 998, 1003 (7th Cir. 1973). "The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions." Gurton v. Arons, 339 F. 2d. 371, 375 (2d Cir. 1964). Using the President as a check against unconstitutional action by its supreme legislative body may or may not be the wisest procedure for unions to follow, but it is clear that it is a permissible decision. The question then is not the wisdom or the permissibility of the union membership vesting in its President final authority for interpreting its constitution, so long as such interpretations are fair and reasonable, but simply whether or not the union did so in this Constitution.

In this respect, Article VI, Section 1(d) delegated to the President and only to the President the duty of interpreting the Constitution. In carrying forward this duty, the President was admonished to consult with International Counsel, but it is clear that consultation does not mean that the International Counsel rather than the President would have the final authority to interpret the Constitution. There is no dispute that in the present case the President consulted with International Counsel and that International Counsel advised the President differently than the President's ultimate interpretation. Where the constitution required the President to act with the "approval" of any other body, it said so in plain language. In fact, on numerous occasions, the duties of the President are prescribed as being subject to "approval." Thus, for example, in Article VI, Section 1(b), the President is required to obtain the approval of the General Executive Board in order to grant certain organizing dispensations. In Article VI, Section 1(d), the President is required to obtain the approval of the General Executive Board in order to suspend or revoke the charter of subordinate bodies. In Article VI, Section 1(h), the President is permitted to accept a call to government service for up to thirty (30) days without any

approval, but he is required to obtain the approval of the General Executive Board if such service is for more than thirty (30) days. Article VI, Section 1(m) requires the President to obtain the approval of the General Executive Board in order to fix the compensation of organizers, representatives, assistants, counsel, accountants and other professional personnel. Article VI, Section 1(n) requires the President to obtain the approval of the General Executive Board in connection with the appointment of a trustee to take charge and control in the affairs of a subordinate body.

In stark contrast, Article VI, Section 1(i) requires no approval by anyone including a majority of the International Convention in order to enable the President to direct a referendum to the members of a subordinate body and Article VI, Section 1(d) requires only consultation with International Counsel, not his approval, with respect to interpretations of the Constitution. As is shown above, Article VI, Section 1(d) itself requires the President to have approval of the General Executive Board with regard to suspension or revocation of charters of subordinate bodies while at the same time requiring only consultation with regard to

interpretations of the Constitution. It is totally inappropriate to attempt to explain this as a matter of sloppy draftsmanship rather than as the expression of a clear and unequivocal intention to permit the President to act in an unhampered fashion with respect to certain matters while restricting his authority with respect to other matters.

It is now settled that a union constitution is a contract between the members of the union and the union itself. In Abrams v. Carrier Corp., 434 F. 2d 1234, 1247-1249 (2d Cir. 1970) the Second Circuit concluded that a union constitution is a "contract." The Supreme Court has recognized that under state law a union constitution is generally accepted as a contract. International Association of Machinists v. Gonzales, 356 U.S. 617, 618-619 (1958); NLRB v. Boeing Co., 412 U.S. 67 (1973); see also Carpenters, Local 657 v. Sidell, ---- F. 2d. ----- , 95 LRRM 2047, 2049 (7th Cir. 1977); Trail v. Teamsters, 542 F. 2d. 961, 966-968 (6th Cir. 1976); Local Union 1219 v. United Brotherhood of Carpenters and Joiners, 493 F. 2d. 93, 95-96 (1st Cir. 1974); Parks v. International Brotherhood of Electrical Workers, 314 F. 2d. 886, 917 (4th Cir. 1963).

BEST COPY AVAILABLE

Since the union Constitution is a contract it is subject to the normal rules of contract interpretation. Thus, an interpretation which gives meaning to every provision of the contract should be preferred over an interpretation that would leave a provision of the contract without force and effect. Muzak Corporation v. Hotel Taft Corporation, 1 N.Y. 2d. 42 (1956). In the event of an inconsistency between a specific provision and a general provision of a contract, the specific provision controls. Muzak Corporation v. Hotel Taft Corporation, supra. Furthermore, it is well settled that a court may not under the guise of interpretation make a new contract for the parties. Rodolitz v. Neptune Paper Products, Inc., 22 N.Y. 2d. 383, 386 (1968). In addition, although courts "do not fashion new contracts for the parties under the guise of contract construction...[they] are required to adjudicate their rights according to the unambiguous terms of the contract and therefore must give the words and phrases employed their plain meaning." Laba v. Carey, 29 N.Y. 2d. 302, 308 (1968).

The International Constitution authorizes the President to direct a referendum vote "on any matter, issue or proposition." The right to seek a referendum on "any matter" includes every matter and there is nothing in the Constitution to indicate that a referendum that has the effect of amending the By-laws of a subordinate body is not included in that definition.*

In Talton v. Belnick, 199 F. 2d. 471 (7th Cir. 1952) the Court declared:

> "By the governing law and contract the Constitution and By-Laws, the Board is authorized to act at any meeting. It would seem that the expression 'any meeting' needs no definition; it is all inclusive, without limitation or restriction, equivalent to 'all' and 'every'." (Emphasis added)

Had the drafters of the Constitution intended to limit the authority of the President, a provision

---

* The appellees have argued that the authority given to the President in Article VI, Section I (i) or the International Constitution, is merely the authority to conduct a poll of the membership. However, when the drafters of the Constitution wished to authorize only a poll of the membership, they said so. In Article VII, Section 3 (p), the General Executive Board is authorized to "conduct a poll of members". It is illogical and absurd to argue that the authority granted to the General Executive Board in Article VII, Section 3(p) to conduct a poll is equivalent to the authority granted to the President in Article VI, Section I (i) to direct a referendum vote of the membership of a subordinate body.

could easily have been drawn which would have stated that the President could "direct that a referendum vote be held by the membership of any subordinate body on any matter, issue or proposition, except By-Law amendments".

The framers of the Constitution did not use such language and their failure to do so established that there is no such restriction upon the power of the President to initiate referenda of the membership of subordinate bodies when he believes that the welfare of such membership will be protected or enhanced by such referenda. Any interpretation of the Constitution that creates such a restriction would be unreasonable at best and an improper amendment of the International Constitution at worst.

Article VI, Section 1, of the Constitution of the International authorizes the President to:

> (i) direct that a referendum vote or a vote by membership meeting be held by the membership of any subordinate body on any matter, issue or proposition when he believes that the welfare of the membership of the subordinate body will be protected or enhanced by such action.

No subordinate body has the authority or power to diminish and vitiate the authority granted to the

President and, in fact, no subordinate body has ever attempted to do so. The By-Laws of the Offshore Division provide alternative methods to the President's constitutional authority to initiate referendum. Article IX Section 4 of the International Constitution provides in paragraph (a):

> "Each subordinate body shall adopt By-Laws or rules governing all aspects of its operation not in conflict with this Constitution. Such By-Laws shall be adopted and amended only by a majority referendum vote.
>
> Any Article in the By-Laws of any subordinate body conflicting with this Constitution is void and may not be enforced. No subordinate body may alter or amend any part of this Constitution." (Emphasis added)

Article XVIII of the By-Laws of the Offshore Division provides for an alternative method of amending the By-Laws.

> "Section 1
>
> These By-Laws may be amended by a secret majority referendum vote of the Division's membership.
>
> Proposed amendments may be submitted to such membership vote by either a majority vote of the Offshore Division Executive Council or by a petition signed by fifteen percent (15%) of the Division's members in good standing.

Section 2

An impartial balloting agency shall conduct all referenda required by this Article." (Emphasis added)

It is clear that these methods were never intended to be exclusive or in conflict with the International Constitution since if they were in conflict with the International Constitution they would be "void". Nevertheless, it seems clear that providing alternative additional methods of initiating referendum can in no way derogate the Constitutional authority vested in the President of the International. Since, as previously shown, the By-Laws and the Constitution, together comprise a contract, the general rule of contract interpretation that the contract should be interpreted as a whole, i.e. every term should be interpreted as a part of the whole and not as if isolated from it, should be applied. See 3 Corbin §§ 545-554.

The Constitution and By-Laws when read together provide for three alternate methods of amending the By-Laws of the Offshore Division, each of them requiring a referendum vote of the membership of the Offshore Division's membership:

1. A referendum vote directed by the International President "when he believes that the welfare of the membership of the subordinate body

will be protected or enhanced by such action", or

2. A referendum vote directed by a majority vote of the Offshore Division Executive Council, or

3. A referendum vote initiated by petition signed by 15% of the Division's members in good standing.

Article XVIII, Section 1 of the Offshore Division's By-Laws is clearly not the exclusive method to amend those By-Laws. The language of the Section is permissive. That intent is made clear by the double use of the word "may". The Section does not say that the By-Laws "shall" be amended or even that they "must" be amended in a particular manner. Instead it provides that the By-Laws "may" be amended and it follows that language in the second paragraph by saying "proposed amendments may be submitted". The drafters were perfectly aware that the word "shall" could be used, since that word appears in Section 2 when the use of an impartial balloting agency is mandatory for a referenda required by this Article.

Clearly, the Offshore Division By-Laws, Article XVIII, on their face do "not" provide the exclusive means of submitting proposed amendments to a referendum vote. Rather, the Constitution and the By-Laws must be read together to provide alternative methods for By-Law amendments.

The By-Laws may not supercede the provisions of the International Constitution. In fact, were the By-Laws to be interpreted as derogating from the Constitution, they would be void (Constitution, Article IX, Section 4).

It is also interesting to contrast, the dual authority vested in both the President pursuant to Article VI, Section 1(d) of the International Constitution and the General Executive Board, pursuant to Article VII, Section 3 of the International Constitution to decide on all questions of law. While vesting dual authority with respect to questions of law, the constitution vests authority to interpret the constitution only in the President and not in the General Executive Board while using almost precisely the same language in Article VI, Section 1(d) as in Article VII, Section 3 except for

the significant omission of the authority and duty to interpret the Constitution. It is purest sophistry to contend that this is but another illustration of sloppy draftsmanship, rather than a specification of constitutional checks and balances which vest final authority to interpret the constitution in the President rather than in any other body of the International.

The question of the wisdom of combining the executive and judicial functions rather than combining the legislative and judicial functions, is an apt subject for debate by political scientists. It was error, however, for the court below to seek to substitute its view that the judicial authority of interpreting the constitution was best combined with the legislative authority of the International Convention* rather than with the administrative and executive authority of the President. That decision had already been made by the membership of the union by adopting its Constitution and was not open to revision by judicial fiat. The court had no more

*The Convention is a legislative body. See Article VII, Section 3 of the International Constitution.

right to rewrite the constitution of a union than it would have the right to rewrite a contract. " ... we are not empowered to rewrite the [union's] constitution ..." Carpenters, Local 657 v. Sidell — F2d—, 95 LRRM 2047, 2052 (7th Cir. 1977).

CONCLUSION

Since the President has the constitutional right to submit referenda to a vote by the membership of a subordinate body which cannot be restricted by the International Convention, the convention resolution denying that right is unreasonable. The District Court's decision which relies for its validity upon the convention resolution must be reversed.

Respectfully submitted

JAFFE COHEN CRYSTAL & MINTZ
Attorneys for Appellant

Ernest Allen Cohen
Allen B. Breslow
of Counsel

Dated: New York, New York
August 5, 1977

JAFFE COHEN CRYSTAL & MINTZ

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
JAFFE COHEN CRYSTAL & MINTZ
Attorneys for

Office and Post Office Address
275 SEVENTH AVENUE
NEW YORK, N. Y. 10001

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on 19
at M.
Dated,

Yours, etc.,
JAFFE COHEN CRYSTAL & MINTZ
Attorneys for

Office and Post Office Address
275 SEVENTH AVENUE
NEW YORK, N. Y. 10001

To

Attorney(s) for

Index No. 77 - 7200 Year 19

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

GERALD L. JOHNSON, CHARLES A. HEMMING, ORION A. LARSON, ROBERT THOMPSON, VIRGIL VALENTINE, individually and as members of the International Organization of Masters, Mates and Pilots of America, AFL-CIO, and the Offshore Division thereof,

Plaintiffs-Appellees

-against-

FRANK T. SCAVO, as President of the Int'l Organization of Masters, Mates and Pilots and as Executive Officer of the Offshore Devision,

Defendant-Appellant

AFFIDAVIT OF PERSONAL SERVICE

JAFFE COHEN CRYSTAL & MINTZ
Attorneys for Defendant-Appellant
Office and Post Office Address, Telephone
275 SEVENTH AVENUE
NEW YORK, N. Y. 10001
(212) OX 1-1200

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------x

GERALD L. JOHNSON, CHARLES A. HEMMING, ORION A. LARSON, ROBERT THOMPSON, VIRGIL VALENTINE, individually and as members of the International Organization of Masters, Mates and Pilots of America, AFL-CIO, and the Offshore Division thereof,

Plaintiffs-Appellees

-against-

FRANK T. SCAVO, as President of the International Organization of Masters, Mates and Pilots and as Executive Officer of the Offshore Division,

Defendant-Appellant

----------x

Docket No.
77 - 7200

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK :
COUNTY OF NEW YORK : ss.:

RICHARD D. MILLARD, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 150 E. 73rd Street, New York, New York, 10021.

On August 5, 1977, deponent personally served two copies of the Memorandum of Law and one copy of the Joint Appendix upon the following parties:

MARVIN SCHWARTZ, P.C.
243 Waverly Place
New York, New York 10014

-and-

TABAK, STEINMAN AND MELLUSI
299 Broadway
New York, New York 10007
Attorneys for Plaintiffs-Appellees

by delivering a true copy thereof to them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorneys for Plaintiffs-Appellees therein.

Richard D. Millard

SWORN to before me this
5th day of August, 1977.

Notary Public

JAMES P. DONOHUE, JR.
Notary Public, State of New York
No. 60-4631181
Qualified in Westchester County
Commission Expires March 30, 1978